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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARIANNE PRETSCHER-JOHNSON, Plaintiff and Appellant, v. AURORA BANK FSB et al., Defendants and Respondents.	H041677 (Santa Cruz County Super. Ct. No. CV179275)

Appellant Marianne Pretscher-Johnson bought a home in Aptos, California for $435,000 and financed the purchase with a home loan, in connection with which she executed a promissory note and deed of trust. Following nonjudicial foreclosure, appellant filed a lawsuit, in propria persona, against Aurora Bank FSB (Aurora Bank), Aurora Loan Services (Aurora Loan), Nationstar Mortgage (Nationstar), Quality Loan Service Corp. (Quality), SCME Mortgage Bankers, Inc. (SCME),[1] and Mortgage Electronic Registration System (MERS). Her complaint asserted three causes of action: (1) quiet title, (2) unjust enrichment, and (3) fraud. Defendants Aurora Bank, Aurora Loan, Nationstar and MERS filed a demurrer on the ground that it did not state facts sufficient to state a cause of action. (Code Civ. Proc., §430.10, subd. (e).)[2] Quality subsequently filed a demurrer on the same ground. The trial court sustained the two demurrers without leave to amend. On October 28, 2014, the trial court ordered

[1] Although named as a defendant, SCME is not a respondent on appeal.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

defendant Quality dismissed with prejudice from the action[3] and entered a judgment of dismissal in favor of defendants Aurora Bank, Aurora Loan, Nationstar, and MERS.

Appellant argues that the court erred by sustaining the demurrers and by not granting her leave to amend her complaint. We find that the demurrers were properly sustained and affirm.

I

Standard of Review

"A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which [the plaintiff] describes the defendant's conduct." (*Ibid.*) A reviewing court does not concern itself with a plaintiff's potential problems of proof. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) "On review from an order sustaining a demurrer, 'we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]' (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)" (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.)

Appellant asserts that the trial court failed to comply with section 472d, which requires the trial court to specify the grounds of its decision.[4] "[T]he requirement of section 472d has no effect on the scope of appellate review. 'While section 472d imposes

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[3] The October 28, 2014 order of dismissal constitutes a judgment (§ 581d) and hereinafter we will refer to it as a judgment.

[4] Section 472d provides: "Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer. [¶] The party against whom a demurrer has been sustained may waive these requirements."

procedural requirements which undoubtedly assist reviewing courts, it prescribes no rule regulating the reviewing process. Nowhere does it provide . . . that the order must be tested only according to the reasons given by the trial court . . . . (I)t is the validity of the court's *action*, and not of the *reason* for its action, which is reviewable.' [Citation.]" (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 (*E. L. White, Inc.*).) The record before us does not indicate that appellant objected below. If she did not, the objection was waived or, more accurately, forfeited. (See *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 962 (*Krawitz*).) Moreover, any error in failing to comply with section 472d was harmless because we examine the complaint de novo. (See *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1128, fn. 4; *E. L. White, Inc., supra*, at p. 504, fn. 2; Cal. Const., art. VI, § 13.)

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.)" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

While we assume the truth of properly pleaded facts, we do not assume the truth of factual allegations contradicted by judicially noticed facts. "[W]hen the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former. [Citations.]" (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1040.) " ' "[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." [Citation.]' (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374; see Code Civ. Proc., § 430.30, subd. (a).)" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

In this case, respondents asked the trial court to take judicial notice of certain recorded documents in support of their demurrers. The court impliedly took judicial notice of the fact that those documents were recorded in the official records of Santa Cruz County and the content of those documents. (See Evid. Code, §§ 452, subd. (c), 459; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265.)

In addition, "when [a demurrer] is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co.*, *supra*, at p. 636.)" (*Blank, supra*, 39 Cal.3d at p. 318.)

II

Facts For Purpose of Demurrer

Appellant signed an adjustable rate promissory note in the amount of $435,000. The note was secured by a deed of trust, which appellant also signed. The deed of trust was recorded in the Santa Cruz County Recorder's Office on July 6, 2007.

The recorded deed of trust stated that appellant was the borrower and the lender was SCME, and it reflected that appellant signed it on June 27, 2007. It stated that the trustee was Stewart Title Company of San Diego, a California Corporation (Stewart Title). It also stated that the beneficiary of the deed of trust was "MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS."

The recorded deed of trust provided that the borrower "irrevocably grants and conveys to Trustee, in trust, with the power of sale," property as legally described with an address of 2510 Phoebe Lane, Aptos, California in the County of Santa Cruz. It also provided: "The Note or a partial interest in the Note (together with this Security

Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer [and] the address to which payments should be made . . . ." It stated that "[i]f the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser." Under the deed of trust, "[p]ayments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15."

The recorded deed of trust executed by appellant further stated: "Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. . . . Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law."

SCME destroyed the note between July 1, 2007, and August 1, 2007.

On July 20, 2007, SCME sent a letter to appellant stating that the loan (which we understand to mean the note) had been sold in the secondary mortgage market place. The letter also stated that Homecomings Financial Network, Inc. (Homecomings) was the new servicer on appellant's loan and appellant should send all future payments to Homecomings.

On March 18, 2008, Aurora Loan sent a letter, entitled "Notice of Assignment, Sale, or Transfer of Servicing Rights," to appellant. It stated that the loan (which we understand to mean the note) had been "sold" by Homecomings to Aurora Loan on the secondary mortgage market.

A "Corporate Assignment of Deed of Trust" was recorded on December 27, 2011 in Santa Cruz County. It reflected that MERS, as nominee for SCME, assigned and transferred "all beneficial interest" under the deed of trust executed by appellant to Aurora Bank.

A "Substitution of Trustee" was recorded on July 6, 2012 in Santa Cruz County. It reflected that Aurora Bank substituted Quality as trustee under the deed of trust in place of Stewart Title.

A "Notice of Default and Election to Sell Under Deed of Trust," which was signed on behalf of Quality as trustee, was recorded on July 6, 2012 in Santa Cruz County. The default notice stated that the property was in foreclosure and provided a contact phone number "[t]o find out the amount you must pay, or arrange for payment to stop the foreclosure . . . ."

On July 12, 2012, appellant sent letters, which requested a certified copy of the note and the name and contact number of the owner of the note, all notices of assignment, and a copy of the loan servicing agreement, to Aurora Loan, Homecomings, Quality, and SCME.

On July 15, 2012, Nationstar sent a letter to appellant informing her that it was the new loan servicer "on behalf of Defendant, Deutsche Bank, Trustee."[5] A "Notice of Assignment, Sale, or Transfer of Servicing Rights" attached to the letter indicated

[5] Deutsche Bank was not a named defendant. There was no allegation in the complaint or a recorded document of which the court took judicial notice showing that Deutsche Bank was substituted as the trustee under the deed of trust executed by appellant.

servicing rights had been transferred from Aurora Loan to Nationstar, effective July 1, 2012.

A "Notice of Trustee's Sale," signed on behalf of Quality as trustee, was recorded on October 30, 2012. The noticed date of sale was November 27, 2012.

A "Trustee's Deed Upon Sale" was recorded on January 7, 2013. The trustee's deed granted and conveyed the subject property to Nationstar. It stated that the trustee sold the property at a public auction on December 27, 2012 and grantee Nationstar paid $404,888.19.[6] It contained the recital that the conveyance was made in compliance with the terms and provisions of the deed of trust executed by appellant, the "Trustee having complied with all applicable statutory requirements of the State of California and performed all duties required by the Deed of Trust . . . ." It also stated that "[a]ll requirements of law regarding the mailing of copies of notices or the publication of a copy of the Notice of Breach and Election to Sell or the personal delivery of the copy of the Notice of Breach and Election to Sell and the posting and publication of copies of the Notice of Sale have been complied with."

None of the defendants possessed the note.

III

Demurrers Properly Sustained

A. *Allegations Not Supporting Any Cause of Action*

1. *Physical Destruction of the Note and Defendants' Lack of Possession*

Appellant did not allege that her debt had been forgiven, intentionally cancelled, or otherwise extinguished by SCME. The mere physical destruction of the promissory note, which is assumed true for purposes of demurrer, did not discharge the underlying debt. If loan documents are merely lost or physically destroyed, "the beneficiary [of the

[6] The trustee's deed stated that the unpaid debt together with costs was $505,849.32.

deed of trust] remains secured, but the trustee or a court may require the posting of a lost instrument indemnity bond as a condition to a trustee sale . . . , a judgment for foreclosure . . . , or a Reconveyance . . . . See *Randolph v. Harris* (1865) 28 Cal. 561; *Huckell v. Matranga* (1979) 99 Cal.App.3d 471." (1 Bernhardt et al., California Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2015) § 1.13, pp. 1-11 to 1-12; see Cal. U. Com. Code, § 3309.)

"California's statutory nonjudicial foreclosure scheme ([Civil Code] §§ 2924-2924k) does not require that the foreclosing party have a beneficial interest in or physical possession of the note. (*Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 440-441 ['We . . . see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note.']; *Lane v. Vitek Real Estate Industries Group* (E.D. Cal. 2010) 713 F.Supp.2d 1092, 1099 [California 'does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale.'].)" (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511-512; see *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84-85, fn. 5; see also *Herrejon v. Ocwen Loan Servicing, LLC* (E.D. Cal. 2013) 980 F.Supp.2d 1186, 1200-1201; *In re Cedano* (B.A.P. 9th Cir. 2012) 470 B.R. 522, 530.) "Notably, [Civil Code] section 2924, subdivision (a)(1), permits a notice of default to be filed by the 'trustee, mortgagee, or beneficiary, or any of their authorized agents.' The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid." (*Debrunner v. Deutsche Bank Nat. Trust Co.*, *supra*, at p. 440 (*Debrunner*).)

The complaint's allegations regarding the destruction of the note and respondents' lack of possession of the note were unavailing.

2. *Fractional Reserve Banking*

The complaint alleged that "[t]he funds loaned to [appellant] were counterfeit currency of the United States in that SCME . . . , or the source that provided the alleged

funds to Countrywide [*sic*], utilized a counterfeiting operation called 'Fractional Reserve Banking', [*sic*] which in essence means that the lender, SCME . . . , committed a felony by creating $435,000.00 of currency of the United States out of thin air and then lent it to the Plaintiff, in violation of 18 U.S.C. § 471."[7] Insofar as appellant was attempting to allege in her complaint that the underlying loan was invalid because the funding of her loan involved "fractional reserve banking"[8] or resulted in a violation of federal law, that was a mere contention, deduction, or conclusion of fact or law.

Further, there were no properly pleaded facts showing that "fractional reserve banking" had any effect whatsoever on appellant's transaction. The complaint alleged that she executed the promissory note and the deed of trust securing that note, and it implied that she acquired lawful title and possession of the property located at 2510 Phoebe Lane in Aptos, California. Appellant has cited no legal authority establishing that "fractional reserve banking" is unlawful.

The complaint's allegations regarding "fractional reserve banking" were unavailing.

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[7] Countrywide was not the original lender or a named defendant. Section 471 of Title 18 of the United States Code provides: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both." (See 18 U.S.C., § 8 [defining phrase "obligation or other security of the United States"].)

[8] An article in the June 1993 Federal Reserve Bulletin states that "[l]aws requiring banks and other depository institutions to hold a certain fraction of their deposits in reserve, in very safe, secure assets, have been a part of our nation's banking history for many years." (<http://www.federalreserve.gov/monetarypolicy/0693lead.pdf>) [as of Dec. 23, 2015].) On the Federal Reserve's Web site, it is explained that "[r]eserve requirements are the amount of funds that a depository institution must hold in reserve against specified deposit liabilities." (<http://www.federalreserve.gov/monetarypolicy/reservereq.htm> [Dec. 23, 2015].)

B. *Purported Causes of Action*

1. *Quiet Title*

Appellant's verified complaint stated that "[t]his complaint is for quiet title . . . as well as damages for fraudulent attempts of interloping Defendants who are attempting to deprive [appellant] of her property." In her quiet title cause of action, appellant alleged that none of the defendants possessed the promissory note or were acting on behalf of the owner of the note since it was previously destroyed. It further alleged that defendants were "interlopers" with respect to her property, and they lacked "standing, authority, right or lawful power to commence a non-judicial default, foreclosure or sale of [appellant's] property . . . ."

Actions to quiet title are governed by section 761.010 et seq. A complaint seeking to quiet title to real property must be verified and include all of the following: (1) a legal description of the property and "its street address or common designation, if any," (2) the title of the plaintiff as to which a determination is sought and the basis of the title, (3) "[t]he adverse claims to the title of the plaintiff against which a determination is sought," (4) "[t]he date as of which the determination is sought, and (5) "[a] prayer for the determination of the title of the plaintiff against the adverse claims." (§ 761.020.) The complaint failed to allege every element necessary to state a cause of action to quiet title. It did not identify any adverse claim to the title asserted by Quality or any other respondent.

The complaint did not state the basis of the title she claimed. It was a judicially noticed fact that a trustee's deed upon sale was recorded on January 7, 2013 and it conveyed the subject property to Nationstar. The complaint's allegation that appellant had "lawful title" of the property located 2510 Phoebe Lane, Aptos, California was inconsistent with the recorded trustee's deed conveying the property. Ordinarily, "[t]he purchaser at the trustee's sale and the grantee in the trustee's deed acquires title free of all rights of the trustor or anyone claiming under or through him . . . . [Citations.]" (*Hohn v.*

Riverside County Flood Control Etc. Dist. (1964) 228 Cal.App.2d 605, 613; see *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831 ["As a general rule, the purchaser at a nonjudicial foreclosure sale receives title under a trustee's deed free and clear of any right, title or interest of the trustor. [Citation.]"].)

Appellant now asserts that the deed of trust recorded on July 6, 2007 established a lien on the subject property, and she suggests that this makes quiet title an appropriate cause of action. (See *Monterey S. P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460 ["In practical effect, . . . a deed of trust is a lien on the property"]; Civ. Code, § 2898, subd. (a) ["A mortgage or deed of trust given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws"].) Ordinarily, once the property is conveyed by a trustee's deed following a trustee's sale, the lien of the deed of trust is removed. "The trustee's deed conveys title free and clear of the lien of the deed of trust under which the foreclosure sale itself was conducted. Because the sale proceeds are to be used to satisfy that lien, it no longer encumbers the property, even if the sale proceeds do not fully satisfy the claim. [Citations.]" (1 Bernhardt et al., California Mortgages, Deeds of Trust, and Foreclosure Litigation, *supra*, § 2.99, p. 2-118.)

Appellant also argues that she should have title because defendants committed fraud and were interlopers without the power to foreclose. The complaint alleged that she was deceived into signing the note and the deed of trust, the information in SCME's July 20, 2007 letter regarding the sale of the "loan" and the new loan servicer was fraudulent and false, the information in Aurora Loan's March 18, 2008 "Notice of Assignment, Sale, or Transfer of Servicing Rights" was false, the "Corporate Assignment of Deed of Trust" and the "Notice of Default and Election to Sell under Deed of Trust" recorded by Aurora Loan was fraudulent and false, and the document substituting Quality as trustee was fraudulent.

While ordinarily "an action to quiet title cannot be maintained by the owner of equitable title as against the holder of legal title" (*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 113, fn. omitted (*Warren*); see *G.R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289, 297), an exception exists where legal title was acquired through fraud. In such case, the holder of the equitable title may bring an action to quiet title against the legal title holder, who acquired "only bare legal title" and holds legal title as a constructive trustee for the benefit of the equitable title holder. (*Warren, supra*, at pp. 113-114.)

The rule that the facts establishing fraud must be specifically pleaded applies to quiet title actions. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214; *Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 584; *Strong v. Strong* (1943) 22 Cal.2d 540, 545-546.) Insofar as appellant was attempting to allege that legal title had been acquired through fraud, the complaint's allegations were not sufficiently specific to withstand demurrer. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*) [elements of fraud].)

Furthermore, "[a]n action to quiet title involving equitable issues is governed by equitable principles. [Citations.]" (*Gavina v. Smith* (1944) 25 Cal.2d 501, 505-506.) A party seeking to quiet title based on equitable principles must ordinarily tender the full amount owing on the secured loan. (See e.g., *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86 [borrower may not quiet title against a secured lender without first paying the outstanding debt secured by the deed of trust]; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 (*Karlsen*) ["A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust. [Citations.]"; *Shimpones v. Stickney* (1934) 219 Cal. 637, 649 [a plaintiff in a quiet title action "is bound by the well-known rule that he who seeks equity must do equity" and mortgagor must do equity by paying secured debt to quiet title against mortgagee]; but see *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878 (*Dimock*) [no tender required where trustee's sale by original

trustee was void because original trustee lacked authority to convey property following substitution of trustee].) The complaint did not state facts that showed appellant complied with the tender requirement or was excused from compliance.[9] (See *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113 (*Lona*).)

2. *Unjust Enrichment*

In the second cause of action labeled "Unjust Enrichment," the complaint alleged that appellant made payments to defendants "when in fact, none of [them] had proper standing to collect funds from [her] because none of [them] possessed the NOTE" and "none of [them] were acting on behalf of a 'noteholder' because the NOTE was destroyed." She averred that the retention of those payments was "unjust" because defendants have not "demonstrated that they are the 'noteholder' [*sic*] acting on behalf of the 'noteholder', [*sic*] or that the Note even exits."

Even assuming unjust enrichment is a cause of action (see e.g., *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726; but see e.g., *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793), the allegations were not sufficient.[10] As already discussed, the mere loss or physical destruction of a promissory note does not bar enforcement of the obligation, and the foreclosing party in a nonjudicial foreclosure is not required to possess the note. The deed of trust executed by appellant provided for sale of the note and changes in the entity known as the loan servicer. Appellant has not cited any authority establishing that she was required to pay only the "noteholder" under

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9 We further discuss the exceptions to the tender requirement in more detail at pp. 17-21, *post*.

10 "Regardless of the labels attached by the pleader to any alleged cause of action, the court examines the factual allegations of the complaint, to determine whether they state a cause of action on any available legal theory. [Citation.]" (*Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 201.) A common count for money had and received, an action at law, is governed by principles of equity, and it may be brought whenever one person has received money that belongs to another and that in equity and good conscience should be returned. (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586.)

the note and deed of trust. Furthermore, the complaint did not allege that any payments made by appellant to defendants were not applied to amounts owing under the note and deed of trust. The complaint did not state facts showing that defendants were unjustly enriched at appellant's expense. (See *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51; Rest.3d Restitution and Unjust Enrichment, §§ 1, 6.)

3. *Fraud*

As to the fraud cause of action, the complaint alleged that "[d]efendants knowingly and fraudulently collected funds from [her] for the repayment of a debt that [they] did not hold" and that defendants "did not have a beneficial interest in or right to collect funds from [her]." It also alleged that the "substitution of trustee document [substituting Quality] is fraudulent due to multiple violations of California Civil Code [section] 2934(a)(2)." It sought a "refund of the funds that defendants have fraudulently induced [her] to pay them, plus applicable interest" and "any other remedy the court deems just and proper and allowed by law."

On appeal, appellant asserts that she alleged sufficient facts entitling her to relief under a fraud theory. " 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar, supra,* 12 Cal.4th at p. 638.)

"In California, fraud must be [pleaded] specifically; general and conclusory allegations do not suffice. [Citations.]" (*Lazar, supra,* 12 Cal.4th at p. 645.) " ' " '[T]he policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.]" (*Ibid.*)

The claim that defendants fraudulently collected funds from her was not pleaded with the requisite specificity. Likewise, the complaint provided no factual detail to support the general, conclusory allegation that the "substitution of trustee document is fraudulent due to multiple violations of California Civil Code [section] 2934(a)(2)." We point out that that section has no subdivisions and has nothing to do with substitution of a trustee under a deed of trust.[11]

Appellant contends that Quality did not have power to foreclose because the "Substitution of Trustee" was "fraudulent" and that "Quality's illegal actions caused [her] to suffered [*sic*] prejudice." The characterization of the "Substitution of Trustee" document as "fraudulent" was a mere contention, deduction, or conclusion of law or fact that is not deemed admitted for purposes of demurrer. (See *Blank*, *supra*, 39 Cal.3d at p. 318; cf. *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 329.) To survive demurrer, a complaint must allege fraud with specificity. (See *Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 182; *Lazar*, *supra*, 12 Cal.4th at p. 645.)

Appellant suggests that we not adhere to the rule of specificity in pleading an action for fraud. This we cannot do. The decisions of the California Supreme Court are "binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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11 Civil Code section 2934 provides in full: "Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property, (or by which any mortgage of, lien upon or interest in personal property a document evidencing or creating which is required or permitted by law to be recorded), is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons."

C. *No Other Viable Legal Theory*

1. *Any Theory*

"The courts of this state have . . . long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. [Citations.]" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Appellant suggests that the facts alleged in her complaint entitle her to relief based on wrongful foreclosure and declaratory relief.

2. *Equitable Action to Set Aside Trustee's Sale*

"After a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale. (*Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202, 209-210.) Generally, a challenge to the validity of a trustee's sale is an attempt to have the sale set aside and to have the title restored. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 (*Onofrio*), citing 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) Deeds of Trusts & Mortgages, § 9.154, pp. 507-508.)" (*Lona, supra,* 202 Cal.App.4th at p. 103.)

"[T]he elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. [Citations.]" (*Lona, supra,* 202 Cal.App.4th at p. 104.)

"Because the action is in equity, a defaulted borrower who seeks to set aside a trustee's sale is required to do equity before the court will exercise its equitable powers. (*MCA, Inc. v. Universal Diversified Enterprises Corp*. (1972) 27 Cal.App.3d 170, 177.) Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. (*Abdallah* [*v. United Savings Bank* (1996)] 43 Cal.App.4th [1101,] 1109; *Onofrio, supra,* at p. 424 [the borrower must pay, or offer to pay, the secured debt, or at least all of the delinquencies and costs due for redemption, before commencing the action].) 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].' (*FPCI RE-HAB 01 v. E & G Investments, Ltd*. (1989) 207 Cal.App.3d 1018, 1022.)" (*Lona, supra,* 202 Cal.App.4th at p. 112.)

Courts have recognized certain exceptions to the tender requirement. (See *Lona, supra,* 202 Cal.App.4th at pp. 112-114.) Appellant unsuccessfully attempts to bring herself within those exceptions.

"[I]f the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. (*Stockton* [*v. Newman* (1957)] 148 Cal.App.2d [558,] 564 [trustor sought rescission of the contract to purchase the property and the promissory note on grounds of fraud]; *Onofrio, supra,* 55 Cal.App.4th at p. 424.)" (*Lona, supra,* 202 Cal.App.4th at pp. 112-113.) Insofar as appellant is attempting to claim that the debt is invalid because SCME procured her signatures to the note and deed of trust by fraud, the complaint lacks sufficient specificity to support such fraud claim. (See *Lazar, supra,* 12 Cal.4th at p. 645.)

"[A] tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary. In such cases, it is

deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. (*Hauger* [*v. Gates* (1954)] 42 Cal.2d [752,] 755.)" (*Lona, supra*, 202 Cal.App.4th at p. 113.) Appellant asserts that, since she generally claimed to have suffered damages and sought to quiet title in her complaint, her "claim offsets the balance of her loan." The complaint does not state any specific claim for damages against the successor beneficiary that could be offset against the amounts owing under the note and deed of trust. (See *Hauger v. Gates*, *supra*, at p. 755; see also Code Civ. Proc., § 431.70[12].)

"[N]o tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face. [Citation.]" (*Lona, supra*, 202 Cal.App.4th at p. 113.) Citing *Dimock, supra*, 81 Cal.App.4th at pp. 876-877, appellant now argues that the trustee's sale was void because it "was accomplished through fraud" by "utilizing a forged legal instrument to assign a Substitution of Trustee."

As to this supposed fraud, appellant points to her written opposition to Quality's declaration of nonmonetary status, not to her complaint.[13] (See Civ. Code, § 2924l [declaration of nonmonetary status].) Even if the more specific allegations presented in the opposition could be added to the complaint, they would not show that the trustee's deed is void on its face.

In that opposition, filed on July 14, 2014, appellant argued: "On or about June 28, 2012, a Substitution of Trustee was filed whereby Michele Rice signed as Vice President

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12 "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations." (§ 431.70.)

13 Quality's declaration of nonmonetary status is not part of the record on appeal.

for Aurora Bank FSB allegedly substituting Quality as Trustee. Upon information and belief, Michele Rice is a known 'robo signor[.]' "[14] Although appellant recognized in her opposition that Rice's signature was notarized by David Davis, an Indiana notary, she asserted: "Upon information and belief, both Michele Rice and David Davis committed perjury by claiming Michele Rice to be Vice President of Aurora Bank FSB. Upon information and belief, Defendant Quality knew or should have known that Michele Rice and David Davis committed perjury by claiming Michele Rice to be Vice President of Aurora Bank FSB and that the Substitution of Trustee was fraudulent and defective."[15] Appellant did not assert that someone other Michele Rice signed the "Substitution of Trustee" or that Aurora Bank had not authorized Michele Rice to sign the document on its behalf.

Those contentions are fundamentally different from the situation in *Dimock*. In that case, a recorded a substitution of trustee replaced the original trustee with a new trustee but the original trustee conducted the trustee's sale. (*Dimock, supra,* 81 Cal.App.4th at pp. 872-873.) The deed of trust executed by Dimock stated "that a recital in a trustee's deed 'of any matters of fact shall be conclusive proof of the truthfulness thereof,' " but the trustee's deed provided to the purchaser by the original trustee

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14 "Several national banks have been accused of using robosigners—loosely defined as bank employees tasked with rapidly signing large numbers of affidavits and legal documents asserting the bank's right to foreclose without the employees actually checking the documents to ensure their accuracy—to fraudulently foreclose on homeowners during the recent financial downturn. [Citations.]" (*Ohio v. GMAC Mortg., LLC* (N.D. Ohio 2011) 760 F.Supp.2d 741, 743.) The complaint does not allege, however, that appellant was not in default.

15 A notary's certificate of acknowledgment is "prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code." (Evid. Code, § 1451.)

following the foreclosure sale "contain[ed] no statement that [the original trustee's] power to act as trustee had survived any recorded substitution." (*Id.* at p. 878.)

The appellate court in *Dimock* concluded that "[u]nder the unambiguous terms of [Civil Code] section 2934a, subdivision (a)(4), the recording of the substitution of trustee transferred to [the new trustee] the exclusive power to conduct a trustee's sale" (*Dimock, supra*, at pp. 874-875) and that, on the record before it, the original trustee "had no power to convey Dimock's property" (*id.* at p. 876). In addition, the appellate court observed that, since the trustee's deed upon sale did not contain any factual recital that undermined the substitution, the trustee's deed "did not create any conclusive presumption that [the original trustee] continued to act as trustee." (*Id.* at p. 878.) Therefore, Dimock "could rely on the face of the record to show that the [original trustee's] deed was void. [Citation.]" (*Ibid.*)

Civil Code section 2934a, subdivision (a)(1), provides in pertinent part that "[t]he trustee under a trust deed upon real property . . . given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by: (A) all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 . . . ." "From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust." (Civ. Code, § 2934a, subd. (a)(4).) Civil Code section 2934a, subdivision (d), provides: "A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. . . . Once

recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section."

The complaint's properly pleaded facts did not indicate that the trustee's sale was void and that, therefore, there was no tender requirement. Neither does appellant demonstrate that she can amend the complaint to show that the trustee's sale was void.

To overcome a voidable sale, "the debtor must tender any amounts due under the deed of trust. (See *Karlsen v. American Sav. & Loan Assn*. (1971) 15 Cal.App.3d 112, 117; *Py v. Pleitner* (1945) 70 Cal.App.2d 576, 582.)" (*Dimock, supra,* 81 Cal.App.4th at pp. 877-878.) The complaint did not satisfy the tender requirement. Consequently, we find it unnecessary to address the remaining elements of an equitable cause of action to set aside the trustee's sale.

3. *Tort Action for Wrongful Foreclosure*

Appellant argues that she has alleged sufficient facts to state a tort cause of action for wrongful disclosure, and such action is "not subject to equitable defenses, such as the tender rule."

In California, a trustee may be liable to the trustor for damages sustained where there has been an illegal, fraudulent, or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 (*Munger*).) Where a "trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale *in excess of the mortgages and liens against said property*. [Citations.]" (*Munger, supra,* at p. 11, fn. omitted, italics added.) A trustee may also be liable for other damages under Civil Code section 3333, which establishes the general rule that the measure of damages for the breach of an obligation not arising from contract "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (See *Miles v. Deutsche Bank National Trust Company* (2015) 236 Cal.App.4th 394, 410 (*Miles*) ["a tort action lies for wrongful

foreclosure, and all proximately caused damages may be recovered"]; *Munger*, *supra*, at p. 11.)

Miles states that "[t]he basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale" and recites the elements of such equitable action, including the requirement of tender. (*Miles*, *supra*, 236 Cal.App.4th at p. 408.) As already discussed, the pleading requirement as to tender or an exception to tender was not satisfied.

Even assuming there is no tender requirement for a tort action for wrongful foreclosure, the complaint did not allege sufficient facts to show that the trustee's sale was tainted by fraud (see *Lazar*, *supra*, 12 Cal.4th at p. 645) or otherwise illegal or willfully oppressive or that there was a causal connection between the trustee's sale and some pecuniary harm suffered by appellant. The complaint failed to state a cause of action for wrongful foreclosure.

4. *Declaratory Relief*

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. [Citations.]" (*Maguire v. Hibernia S. & L. Soc*. (1944) 23 Cal.2d 719, 728; see § 1060.) Further, " 'an actual, present controversy must be pleaded specifically' and 'the facts of the respective claims concerning the [underlying] subject must be given.' [Citations.]" *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80.) Appellant asserts that she raised an actual controversy as to which entity she was "legally supposed to pay." The complaint alleged that her loan was sold in the secondary mortgage market place, but it did not allege, as she now claims, that "the loan was pooled with other loans and sold in the secondary mortgage market as a mortgage backed security."

Appellant suggests that respondents demanded money from her, but that as a result of the mortgage crisis and governmental intervention, they may have already received monies allowing them to recover some of their losses, including the loss related to her loan. Appellant contends that she is entitled to a declaration regarding respondents' rights to "even more money than they have already received" and her "duty to pay the full amount demanded."

The complaint did not state that appellant had paid any particular amount to any respondent on the debt evidenced by the promissory note and deed of trust executed by appellant or that any payment had not been properly applied to the amounts she owed under those instruments. The complaint did not allege that any respondent had demanded further payments from her after the foreclosure.[16]

The complaint failed to set forth facts showing that an actual controversy existed regarding the parties' legal rights and duties under the promissory note or deed of trust.

IV

No Abuse of Discretion in Denying Leave to Amend

" 'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. [Citations.] Plaintiff must show in what manner he can amend his

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16 Section 580d, subdivision (a) establishes that "no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust . . . executed in any case in which the real property . . . has been sold by the . . . trustee under power of sale contained in the . . . deed of trust." In a nonjudicial foreclosure, "the borrower is relieved from any *personal liability* on the debt[] [citation]" and "in the event of a default, the borrower stands to lose only such property as he or she specifically chose to place at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the assets pledged as security for the loan." (*Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 411.)

complaint and how that amendment will change the legal effect of his pleading. [Citation.]' (*Cooper v. Leslie Salt Co.* [(1969)] 70 Cal.2d 627, 636.)" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

It is not enough to simply invoke the right to amend. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 [assertion of an abstract right to amend insufficient].) "Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098; *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.)" (*Id.* at p. 44.)

The trial court did not abuse its discretion in denying plaintiff leave to amend. Appellant failed to meet the burden of demonstrating a reasonable possibility that she could cure the pleading defects by amendment.[17]

DISPOSITION

The judgments of dismissal are affirmed. Respondents are entitled to costs on appeal.

[17] Given our conclusions regarding the propriety of the trial court's ruling, we do not address Quality's contention that the litigation privilege applies to nonjudicial foreclosure procedures and notices and operates to bar any action against it.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

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